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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

CRAIG BAUMBUSCH, Plaintiff and Appellant, v. VICTOR VALLEY COMMUNITY COLLEGE DISTRICT et al., Defendants and Respondents.	E053267 (Super.Ct.No. CIVVS1005762) OPINION

APPEAL from the Superior Court of San Bernardino County. Gilbert G. Ochoa, Judge, and Kirtland L. Mahlum, Temporary Judge (pursuant to Cal. Const., art. VI, § 21).[1] Affirmed.

Craig Baumbusch, in pro. per., for Plaintiff and Appellant.

Carpenter, Rothans & Dumont, Louis R. Dumont and Justin Reade Sarno for Defendants and Respondents.

[1] Judge Ochoa entered the judgment; however, Commissioner Mahlum presided over the hearings on and sustained the demurrers to Baumbusch's petition.

On August 11, 2010, plaintiff and appellant Craig Baumbusch (Baumbusch) filed a petition for writ of mandamus against Victor Valley Community College District (District), and against Angela Valles, Dennis Henderson, Joe Range, Don Nelson and Chris Mollenkamp, as members of the District's Board of Trustees; Christopher O'Hearn, as District President; Fusako Yokotobi, as District Vice-President Human Resources; Leonard Knight, as District Chief of Police; Noreen Jacquez (Jacquez), as District Employee; and Salena Gonzales (Gonzales), as District Employee (herein collectively referred to as Defendants), seeking to enjoin Jacquez and Gonzales from "unlawfully exercising the powers of a peace officer and unlawfully occupying the classified position of Campus Police Officer." The District and Defendants demurred to the petition for writ of mandamus. The trial court sustained the demurrers without leave to amend, and on March 4, 2011, judgment of dismissal was entered. Baumbusch challenges the trial court's ruling.

I. PROCEDURAL BACKGROUND AND FACTS

A demurrer admits all the truth of all facts properly pleaded. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967.) Accordingly, we will refer to the allegations in the complaint, or in this case, the petition for writ of mandamus, for the chronology of this matter. (See *Align Technology, Inc. v. Tran* (2009) 179 Cal.App.4th 949, 954.) "[O]n review of a demurrer, in addition to the allegations of the complaint, we may consider other relevant matters of which the trial court could have taken judicial notice and we may treat such matters as having been pleaded. [Citations.]" (*Coopers & Lybrand v. Superior Court* (1989) 212 Cal.App.3d 524, 538.)

Baumbusch is a police officer for the District. He is the president of the Police Officers Association, Victory Valley Community College District—Police Department (Association). On March 5, 2010, the Association, via Baumbusch, filed a California Educational Employment Relations Act (EERA) Representation Petition, requesting severance from the "incumbent employee organization California School Employees Association [(CSEA)] chapter 584 . . . pursuant to the California Educational Employment Relations Act . . . ." The Association wanted to create "a bargaining unit consisting of 'persons appointed as campus police officers or campus reserve police officers in compliance with California state laws and district policies . . . ." On March 24, 2010, CSEA filed a statement in opposition to the severance petition, questioning "whether the Association had the support of a majority of the employees in the proposed unit," and the "appropriateness of the bargaining unit described by the Association." On April 13, the District filed its response to the severance petition, stating that the "employees covered by the severance request are currently included in a wall-to-wall classified bargaining unit represented by the [CSEA]," that the "size of the proposed unit is 13," that "CSEA was recognized as the exclusive representative on May 10, 1976," and that the written agreement between CSEA and the District would expire on June 30, 2010. The response also stated that a copy of the posted notice had been sent to the Public Employment Relations Board (PERB) "on April 2, 2010, as requested."

The Association submitted a "Statement of non-concurrence and disagreement with information obtained by" PERB from District. Specifically, the Association alleged that Jacquez and Gonzales were unlawfully designated as peace officers, were unlawfully

exercising the powers of a peace officer, and were unlawfully occupying the classified position of Campus Police Officer. On April 23, 2010, PERB stated that the District "confirmed the accuracy of the [Association's] statements," that the District "must file . . . a decision," and that the Association "may file a petition for Board investigation . . . if . . . [a] decision is not filed or [the District] does not request a Board investigation." In a letter dated August 4, 2010, PERB stated: "On May 10, 2010, the District declined to recognize the Association as the exclusive representative of the proposed unit due to the outstanding issues raised by CSEA."

On July 7, 2010, PERB conducted an informal conference to explore settlement and clarify the issues. It found that the issue currently before PERB is whether the bargaining unit that the Association sought to create is appropriate. In answering this question, PERB analyzed three areas, namely, community of interest, efficiency of the District's operations, and history of representation. Regarding the first area, PERB found that "the specific positions identified in the Association's petition do not have a community of interest separate and distinct from other positions in CSEA's bargaining unit." Regarding the second area, PERB found that "the unit proposed by the Association appears to negatively affect the efficiency of the District's operations," because it would cause duplication of negotiation efforts in that the District would have to negotiate with two separate bargaining units for two separate sets of employees, even though the positions share many of the same working conditions. Finally, as to the third area, PERB found there was insufficient evidence to suggest that CSEA's representation was either effective or ineffective. However, given the first two areas, PERB concluded that the

Association's proposed bargaining unit "does not appear to be an appropriate unit." Nonetheless, PERB offered the Association an "opportunity to SHOW CAUSE as to why its severance petition[] should not be dismissed for seeking to create an inappropriate bargaining unit."

On August 11, 2010, the Association responded to PERB's order to show cause. After considering the Association's response, on September 9, 2010, PERB dismissed the Association's severance petition on the grounds that the proposed unit is not an appropriate unit. Six days later, the Association filed an appeal before PERB on its order of dismissal of the severance petition. PERB denied the Association's appeal and ordered that its severance petition be dismissed. Simultaneously, on August 31, 2010, Baumbusch, in his individual capacity, filed a petition for writ of mandamus against Defendants. He sought to enjoin Vasquez and Gonzales "from unlawfully exercising the powers of a peace officer and from unlawfully occupying the classified position of Campus Police Officer."

The District and Defendants separately demurred. The District argued that Baumbusch had failed to exhaust his administrative remedies, that he had an adequate remedy at law to contest the allegation that "there are persons 'unlawfully exercising the powers of a peace officer and unlawfully occupying the classified position of Campus Police Officer,'" and that he failed to plead facts sufficient to state a cause of action against the District and Defendants. Baumbusch opposed the District's demurrer. Following argument, the trial court sustained the demurrer without leave to amend, stating: "First, as to the actions relating to the composition of the bargaining unit. I

agree it is initially—PERB has initial jurisdiction; that Mr. Baumbusch, an individual, has not brought an action in front of PERB, so he has not exhausted his administrative remedies. Again, I'm talking about Mr. Baumbusch as an individual. Secondly, the court does not feel that he has sufficiently shown that he has standing in this matter for the previously— reasons previously stated. He has not brought it either as the Interim Chief of Police nor as the president of the association. And, again, I've already stated my reasons. I don't feel that he has sufficiently shown standing as petitioner in this case." Defendants' demurrer was also granted without leave to amend, on the same grounds. Baumbusch appeals.

II. STANDARD OF REVIEW

"'On review of an order sustaining a demurrer without leave to amend, our standard of review is de novo, "i.e., we exercise our independent judgment about whether the complaint states a cause of action as a matter of law." [Citation.]' [Citation.] '"'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.]"' [Citation.] '"We affirm if any ground offered in support of the demurrer was well taken but find error if the plaintiff has stated a cause of action under any possible legal theory. [Citations.] We are not bound by the trial court's stated reasons, if any, supporting its ruling; we review the ruling, not its rationale. [Citation.]' [Citation.]" (*Walgreen Co. v. City and County of San Francisco* (2010) 185 Cal.App.4th 424, 433; see also *Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42.)

III. DISCUSSION

According to his petition, Baumbusch sought to enjoin Jacquez and Gonzales from exercising the powers of "peace officers" and from occupying the classified position of "campus police officers," because neither possessed the required training certificates, as required by, inter alia, Penal Code sections 832.2, 832.3, subdivisions (a), (f), 832.4, subdivisions (a) and (b). However, Baumbusch also referenced his position as president of the Association, CSEA's position as the exclusive employee organization representing the District, the Association's petition for severance from CSEA, the District's response, and PERB's statement that the District confirmed the accuracy of the Association's statement.

According to the trial court and the District, Baumbusch was raising two intertwined issues, namely, the composition of the bargaining unit (CSEA or the Association) and whether the District may allow its employees to exercise the powers of peace officer when they do not possess all of the required training and certificates. In response to both issues, the trial court found that Baumbusch had an adequate remedy at law in the form of administrative redress before PERB, which he, as a citizen of the State of California, failed to bring. On appeal, Baumbusch contends "this is a case of public officers of public entities arrogantly, recklessly and erroneously believing they can defy, ignore, impair and defeat United States and California State legislation, decisional law, and constitutional law. . . . Continuing to unlawfully employ, unlawfully compensate and unlawfully designate Jacquez and Gonzales as campus police officers . . . denies to the

Community the equal protection and uniform application of the law while perpetrating the end-run of Community betrayal institutionalized by [the Districts and Defendants]."

In a nutshell, it appears that Baumbusch is not happy that he had to be included in the same bargaining unit as two members whom he alleges lack the required certifications, and that his newly created unit, the Association (which did not include the two members), was denied severance to bargain separately from CSEA (which did include the two members). When the Association's severance petition was denied, Baumbusch, individually, turned to the courts for an order directing the District to terminate Jacquez and Gonzales as campus police officers. We, like the trial court, conclude that Baumbusch has failed to exhaust his administrative remedies.

To begin with, Baumbusch's primary complaint is that the District and Defendants, by employing Jacquez and Gonzales as campus police officers, are in violation of various Education, Vehicle, Government and Penal Code sections, along with both the United States and California Constitutions. Pursuant to Government Code section 3541.3, PERB is vested with certain powers and duties, including the power to "investigate . . . alleged violations of this chapter, and take any action and make any determinations in respect of these . . . alleged violations as the board deems necessary," and to "take any other action as the board deems necessary to discharge its powers and duties . . . ." (Gov. Code, § 3541.3, subds. (i) & (n).) The alleged violations of the various statutes are within the investigatory power of PERB. (*Leek v. Washington Unified School Dist.* (1981) 124 Cal.App.3d 43, 50-51.)

"In general, a party must exhaust its administrative remedies before resorting to the courts. [Citation.] Under this rule, an administrative remedy is exhausted only upon termination of all available, nonduplicative administrative review procedures. [Citation.]" (*City and County of San Francisco v. International Union of Operating Engineers, Local 39* (2007) 151 Cal.App.4th 938, 947 (*Local 39*).) Here, the issue raised by Baumbusch was not raised in the Association's severance petition or its appeal. Rather, the only issue PERB was called upon to decide was the appropriateness of the Association's severance petition. Thus, Baumbusch must first exhaust his administrative remedies. Although he argues that "[c]ourts of appeal have held that where the conduct of a party is claimed to violate a **duty** imposed under the Education Code exhaustion of PERB remedies is not required," (italics omitted, boldface in original) his reliance on *Pittsburg Unified School Dist v. California School Employees Assn.* (1985) 166 Cal.App.3d 875, 887 (*Pittsburg*), for this proposition is misplaced.

In *Pittsburg*, a school employees association was picketing and leafleting outside the personal offices of certain school board members during negotiations. (*Pittsburg*, *supra*, 166 Cal.App.3d at pp. 881-882.) The school district sought a temporary restraining order. (*Id*. at p. 882.) A preliminary injunction was later granted and the association appealed. (Id. at pp. 883-884.) Confronting the issue of jurisdiction, the court found that the activity was arguably protected or arguably prohibited by EERA; however, the court concluded that the school district was excused from the requirement to exhaust its administrative remedies with PERB because of the "'local concern'" exception to preemption. (*Pittsburg*, *supra*, at p. 886.) Specifically, the court observed

that certain issues are "neither of jurisdictional interest to PERB nor within its areas of expertise." (*Pittsburg*, *supra*, at p. 888.) In *Pittsburg*, it was issues of corrupt practices and conflicts of interest involving members of the governing board of a school district. (*Ibid*.) "Such issues are, on the other hand, of obvious interest to the public and involve legal questions squarely within the jurisdiction and expertise of the courts." (*Ibid*.) Here, there is no disparity between the public and PERB interest at stake, which relates to providing campus police services.

Notwithstanding the above, we recognize that "[t]he failure to exhaust an administrative remedy is excused if it is clear that exhaustion would be futile. [Citation.] For the futility exception to apply, it is not sufficient that a party can show what the agency's ruling would be on a particular issue or defense. [Citation.] Rather, the party must show what the agency's ruling would be in the particular *case* before the court. [Citation.]" (*Local 39*, *supra*, 151 Cal.App.4th at p. 947.) Here, Baumbusch cannot invoke the futility exception simply by pointing to this statement by PERB: "To the extent that the Association is seeking to have PERB require the District to comply with the Association's interpretation of the Penal Code, PERB lacks the jurisdiction to do so." Rather, Baumbusch must show how PERB inevitably would rule on his claim that the District's employment of Jacquez and Gonzales as campus police officers is in violation of several statutory laws. Other than mere speculation, Baumbusch has not attempted to carry that burden.

Moreover, in deciding whether the administrative jurisdiction exception applies, we consider "the injury or burden that exhaustion will impose, the strength of the legal

argument that the agency lacks jurisdiction, and the extent to which administrative expertise may aid in resolving the jurisdictional issue. [Citation.]" (*Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd*. (2005) 35 Cal.4th 1072, 1082.) Here, to the extent that Baumbusch is singling out Jacquez and Gonzales, he is, in effect, challenging the composition of the bargaining unit, whether it be the Association or CSEA, and the trial court correctly ruled that PERB had exclusive jurisdiction over this dispute. Otherwise, as noted above, alleged statutory violations are within the investigatory powers of PERB, and an appeal to PERB is the more expedient remedy when compared to filing an action in the trial courts.

Finally, we agree with the trial court's finding that Baumbusch lacked standing as an individual. As the District and Defendants point out, Baumbusch "does not assert that he was seized or otherwise detained by the individuals he claims were acting as peace officers without authority. In fact, [he] does not assert an injury with respect to any duty owed by the [D]istrict outside the context of the severance petition, which is a matter exclusively within the domain of PERB."

For the above reasons, the trial court properly granted the demurrer without leave to amend.

IV. DISPOSITION

The judgment is affirmed. District and Defendants are awarded costs on appeal.

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HOLLENHORST
J.

We concur:

RAMIREZ
P.J.

MCKINSTER
J.